Supreme Court, U.S.
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No. 03-373

In the

Supreme Court of the United States

GARY E. HELLER,

Petitioner,

v.

URBANO C. ALEJO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In accordance with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Respondent has sued Petitioner Gary E. Heller, a prison guard, for unconstitutional treatment during his incarceration as a federal prisoner. Respondent's constitutional claims challenge the *conditions* of his confinement as a prisoner, and do not challenge either the *fact* or *duration* of his confinement. In *Heck v. Humphrey*, the Court held that an action brought by a state prisoner under Title 42, Section 1983, of the United States Code would be barred if, in order to be successful, it "would necessarily imply the invalidity of his conviction or sentence," but added that a prisoner's Section 1983 action "should be allowed to proceed" if it would not require invalidation of a criminal judgment. *Heck*, 512 U.S. 477, 487 (1994). Here, the Court of Appeals observed that Respondent's *Bivens* claims against Petitioner "challenge[d] the conditions of his confinement," rather than the validity of any criminal conviction or sentence, and thus could not "be barred by *Heck*." Pet. App. 13a. In advance of the Seventh Circuit's ruling, Petitioner abandoned any argument that *Heck* barred Respondent's claims and instead pressed the Court of Appeals, unsuccessfully, to affirm the dismissal of those claims on other grounds.

Properly formulated, the question presented by Petitioner Heller's petition for a writ of certiorari is:

> Did the Court of Appeals correctly conclude that Respondent's *Bivens* claims against Petitioner Heller was not barred under *Heck*, where Respondent's claims

challenged only the conditions of his confinement and not the fact or duration of that confinement, and Petitioner had abandoned on appeal any argument that *Heck* barred Respondent's claim?

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STATEMENT OF THE CASE

Respondent does not perceive any misstatement of fact in the Petitioner's statement of the case which is material to the question presented, and he provides the following supplemental facts.

Following Respondent's opening brief before the Court of Appeals, which argued that the District Court had erred in holding that *Heck* barred his claims against Petitioner, Heller requested and received two extensions of the time so that the Department of Justice in Washington, D.C. could assist him in preparing his response. Resp. App. 1a-11a. Petitioner subsequently filed a responsive brief which did *not* argue that the District Court had been correct in concluding that *Heck* barred Respondent's claims. Petitioner instead asked the Court of Appeals to affirm the District Court *solely* "on other grounds"—*i.e.*, an alleged lack of personal involvement by Heller in the misconduct charged by Alejo, and qualified immunity. Resp. App. 21a-23a. After the Court of Appeals reversed the dismissal of Alejo's claims against Petitioner, Petitioner did not request rehearing by the panel or *en banc*.

REASON TO DENY THE PETITION

Respondent recognizes that, in *Muhammad v. Close*, No. 02-9065, the Court granted a petition for writ of certiorari on the following question: whether a plaintiff who wishes to bring a Section 1983 suit challenging only the conditions, rather than the fact or duration, of his confinement, must satisfy the favorable

termination requirement of *Heck v. Humphrey*. *Muhammad v. Close*, No. 02-9065 (June 16, 2003). Petitioner, however, erroneously contends that "this Court's resolution of *Muhammad* will govern the disposition of this case." (Pet. Br. 5.)

Petitioner abandoned all arguments relating to *Heck* in the merits brief he submitted to the Seventh Circuit. Although the District Court had relied upon *Heck* to dismiss claims against Petitioner, Heller referred to *Heck* only twice in the "Argument" portion of that brief—(i) as part of a quote from a Magistrate Judge's report, and (ii) in discussing a Seventh Circuit case that had applied *Heck*. Both of those citations appeared as part of a discussion urging an affirmance of the District Court "*on other grounds*." Resp. App. 22a-23a (emphasis added). Heller acknowledged that, under Seventh Circuit caselaw, Alejo's claims were not barred by *Heck*; and he did not contend that the Seventh Circuit's interpretation of *Heck* was erroneous or that it should be overruled. Resp. App. 21a-23a. After the Seventh Circuit handed down its ruling, Petitioner did not seek rehearing to correct any believed error in the application of *Heck*.

Petitioner may not seek relief from this Court on grounds that were abandoned in the Court of Appeals. *See Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (declining to reach question raised for the first time in Supreme Court); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). Petitioner made the choice—after conferring with the Department of Justice over a two-month period—not to seek affirmance of the District Court on the basis of *Heck*, but instead to seek affirmance solely on other grounds. The fact that this

Court subsequently granted a petition for certiorari in *Muhammad* is not a basis for relieving Petitioner of the consequences of his unsuccessful strategic decision.[1]

CONCLUSION

For the foregoing reason, Heller's petition should be denied.

Respectfully submitted,

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NOVEMBER 13, 2003

[1] Respondent, of course, contends that the Seventh Circuit properly reversed the dismissal of his claims against Petitioner and reserves his right to so argue in the event Heller's petition is granted

(Any footnotes to trail end of each document)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1573

URBANO ALEJO,
Plaintiff-Appellant,

v.

GARY HELLER, et al.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 94 C 682

Honorable J. Phil Gilbert
District Judge Presiding

DEFENDANT-APPELLEES' MOTION
FOR EXTENSION OF TIME TO FILE
APPELLEE'S BRIEF

Defendants-appellees, by and through his attorneys, Miriam F. Miquelon, United States Attorney for the Southern District of Illinois, and Gerald M. Burke, Assistant United States Attorney, respectfully requests this Court grant a twenty working day extension of time or until November 12, 2002 for Defendants-appellees to file their brief pursuant to Fed. R. App. P. 26(b).

1. This counsel realizes that extensions of time to file briefs are not favored. See Cir. R. 26. In certain circumstances within five days before the brief is due, however, may lead to an extension. See id. This counsel asserts that his circumstances fall into that narrow category for extensions.

2. This counsel had reserved time sufficient to work on this brief in the thirty (30) days before the brief was due. That time, however, was limited due to the following major projects: (a) preparing for two separate trials on student loan dischargeability actions before the United States Bankruptcy Court for the Southern District of Illinois; (b) working on coordinating a large health care fraud investigation that requires a substantial period of time, the investigation is at a critical stage and involves a long term undercover operation that the parties are attempting to negotiate a joint civil and criminal resolution involving major corporations and very substantial dollar amounts; (c) the Appellants brief raised substantial and important issues such that the undersigned sent the brief to the Appellate Division of the Department of Justice to see if they would assist in the preparation and writing of the brief. At this time he has not received a response to his request.

3. This counsel reasonably believes that the issues raised in the brief deserve complete and thorough briefing, and, as such, has requested assistance from the Department of Justice, Appellate Division. In the absence of such assistance, additional time to file his brief is, unfortunately, required.

4. Only I had working knowledge of the above cases and therefore could not in practicality have other counsel assist. This office and counsel give litigation in the Seventh Circuit top priority.

5. These above facts in paragraph three did not exist earlier or were not, or with due diligence could not have been, known earlier to this counsel.

6. Plaintiff-appellant Alejo will not be prejudiced.

Wherefore, Defendants-appellees respectfully request an extension of twenty working days or until November 12, 2002, within which to file their brief.

GARY E. HELLER
KEVIN MURPHY
FERNANDO CASTILLO
M. L. BATTS
JESUS NAVARRO

Respectfully submitted,

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PROOF OF SERVICE

I, S. Carr, certify that I am an employee in the Office of the United States Attorney for the Southern District of Illinois and am a person of such age and discretion as to be competent to serve papers. On October 9, 2002, I served: DEFENDANTS-APPELLEES' MOTION FOR EXTENSION OF TIME by placing a copy in a postpaid envelope addressed to the below listed persons and by depositing the envelope in the United States Mail at 331 Salem Place, Fairview Heights, Illinois 62208.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1573

URBANO C. ALEJO,
Plaintiff-Appellant,

v.

GARY HELLER, et al.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 94 C 682

Honorable J. Phil Gilbert
District Judge Presiding

DEFENDANTS-APPELLEES' SECOND MOTION FOR EXTENSION OF TIME TO FILE APPELLEE'S BRIEF

Defendants-Appellees Gary Heller and Keith Heckler, by and through their attorneys, Miriam F. Miquelon, United States Attorney for the Southern District of Illinois, and James M. Hipkiss and William E. Coonan, Assistant United States Attorneys, respectfully request that this Court grant a ten-day extension of time to and including November 22, 2002, for Defendants-Appellees to file their appellees' brief pursuant to Fed. R. App. P. 26(b).

1. This counsel, who works regularly on appeals, realizes that extensions of time to file briefs are not favored. See Cir. R. 26. Certain circumstances within five days before the brief is due, however, may lead to an extension. See id. This counsel asserts that his circumstances fall into that narrow category for extensions.

2. Originally, Appellees' brief was due on October 16, 2002. On October 10, 2002, this office requested a first extension of time. On October 10, 2002, this Court granted the motion; Appellees' brief was now due on November 12, 2002.

3. As much, however, as this counsel reserved time to prepare and finish the brief in this matter, the following emergency situations related to this appeal took away that time previously reserved.

4. First, Plaintiff's first argument of his appellant's brief relies on the Seventh Circuit case, DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), which overruled previous Seventh Circuit precedent. As Plaintiff argues, the district court relied on this precedent which has been overruled. This office has been diligently attempting to work with the Civil Division of the Department of Justice in Washington, D.C., and the relevant agency, the Bureau of Prisons, to resolve this particular issue for the defense of this action. However, the coordination of this matter between the above-mentioned government entities has taken much longer than first anticipated.

5. Second, this office has just re-assigned this appeal to two other Assistant United States Attorneys, James M. Hipkiss and William E. Coonan.

6. This office and counsel give litigation in the Seventh Circuit top priority. The above facts did not exist earlier or were not, or with due diligence could not have been, known earlier to this counsel. The coordination between the Civil Division of the Department of Justice in Washington, D.C., the Bureau of Prisons headquarters, and the Bureau of Prisons local office took longer than expected. This counsel requests ten days as an extension.

7. This motion for extension is not made for the purpose of delay. Plaintiff-Appellant will not be prejudiced.

Wherefore, Defendants-Appellees respectfully request an extension of ten days or until November 22, 2002, within which to file their brief,

Respectfully submitted,

GARY HELLER
KEITH HECKLER

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PROOF OF SERVICE

I, Marianne V. Weisenfeld, Legal Assistant, certify that I am an employee in the Office of the United States Attorney for the Southern District of Illinois and am a person of such age and discretion as to be competent to serve papers. On November 8, 2002, I served: DEFENDANTS-APPELLEES' SECOND MOTION FOR EXTENSION OF TIME TO FILE APPELLEE'S BRIEF placing a copy in a postpaid envelope addressed to the below listed persons and by depositing the envelope in the United States Mail at 331 Salem Place, Fairview Heights, Illinois 62208.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1573

URBANO C. ALEJO,
Plaintiff-Appellant,

v.

GARY HELLER, et al.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 94 C 682

Honorable J. Phil Gilbert
District Judge Presiding

DECLARATION OF WILLIAM E. COONAN

I, William E. Coonan, Assistant United States Attorney, declare the following:

1. I am an Assistant United States Attorney. I am aware of the facts surrounding the appeal in this case.

2. This counsel, who works regularly on appeals, realizes that extensions of time to file briefs are not favored. See Cir. R. 26. Certain circumstances within five days before the brief is due, however, may lead to an extension. See id. This counsel asserts that his

circumstances fall into that narrow category for extensions.

3. Originally, Appellees' brief was due on October 16, 2002. On October 10, 2002, this office requested a first extension of time. On October 10, 2002, this Court granted the motion; Appellees' brief was now due on November 12, 2002.

4. As much, however, as this counsel reserved time to prepare and finish the brief in this matter, the following emergency situations related to this appeal took away that time previously reserved.

5. First, Plaintiff's first argument of his appellant's brief relies on the Seventh Circuit case, DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), which overruled previous Seventh Circuit precedent. As Plaintiff argues, the district court relied on this precedent which has been overruled. This office has been diligently attempting to work with the Civil Division of the Department of Justice in Washington, D.C., and the relevant agency, the Bureau of Prisons, to resolve this particular issue for the defense of this action. However, the coordination of this matter between the above-mentioned government entities has taken much longer than first anticipated.

6. Second, this office has just re-assigned this appeal to two other Assistant United States Attorneys, James M. Hipkiss and William E. Coonan.

7. This office and counsel give litigation in the Seventh Circuit top priority. The above facts did not exist earlier or were not, or with due diligence could not

have been, known earlier to this counsel. The coordination between the Civil Division of the Department of Justice in Washington, D.C., the Bureau of Prisons headquarters, and the Bureau of Prisons local office took longer than expected. This counsel requests ten days as an extension.

8. This motion for extension is not made for the purpose of delay. Plaintiff-Appellant will not be prejudiced.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2002.

WILLIAM E. COONAN
Assistant United States Attorney

No. 01-1573

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

URBANO C. ALEJO,
Plaintiff-Appellant,

v.

GARY HELLER and KEITH HECKLER,
Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois
Case No. 94 C 682
Honorable District Judge J. Phil Gilbert

BRIEF OF DEFENDANTS-APPELLEES GARY HELLER AND KEITH HECKLER

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* * *

SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Urbano C. Alejo filed an action seeking damages relating to his allegations that numerous correctional officials retaliated against him because he was Cuban by preparing a false incident report. The district court properly found for the defendants. Therefore, this Court should affirm the district court's judgment.

Argument I

Defendant recognizes that the holding of DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), is now the law of this circuit in its analysis of the issue of whether Alejo's Bivens claim is barred, but this Court should affirm the judgment of the district court on other grounds.

Argument II

This Court should affirm the district court's judgment in favor of defendant Gary Heller on the grounds of lack of personal involvement and qualified immunity.

Argument III

The district court properly dismissed defendant Keith Heckler without prejudice at the in forma pauperis stage when the pro se plaintiff failed to allege any personal involvement on the part of defendant Heckler. Furthermore, plaintiff Alejo waived any challenge to this dismissal without prejudice because he failed to file an amended complaint to cure any defects within the six-plus years before the entry of final judgment

ARGUMENT

I. Defendant Gary Heller recognizes that the holding of DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), is now the law of this circuit in its analysis of the issue of whether Alejo's Bivens claim is barred, but this Court can affirm the judgment of the district court on other grounds.

In his report and recommendation, adopted by the district court in its entirety, the magistrate judge recommended the dismissal of Alejo's claim without prejudice. The magistrate judge relied "on a line of cases holding that, when an inmate's success on a § 1983 claim for damages would necessarily imply the invalidity of the result of a disciplinary proceeding, the claim does not arise until the result has been invalidated. See Heck a Humphrey, 512 U.S. 477 (1994); Miller v. Indiana Dept. of Corrections, 75 F.3d 330, 331 (7th Cir. 1996)." (P1. App. A015). This Court's standard of review of the district court's dismissal is de novo. Duffy v. United States, 966 F.2d 307, 310 (7th Cir. 1992).

Alejo argues that this Court should reverse Heller's dismissal by virtue of DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000). (Appellant's Brief, at 13-16). In DeWalt, this Court held that the prisoner's claim for damages for loss of his prison job could not be barred because the prisoner challenged only the conditions of confinement rather than the fact or duration of his confinement. Id. at 613, 616-17.

In DeWalt, this Court also stated that "the Supreme Court never has addressed whether Heck's "favorable termination" requirement bars a prisoner's challenge under § 1983 to an administrative sanction that does not affect the length of confinement." 224 F.3d at 616. Because of the open question, the Court felt able to analyze the concurring and dissenting opinions in Spencer v. Kemna, 523 U.S. 1 (1998), to determine that five Supreme Court justices now hold the view that a 42 U.S.C. § 1983 action must be available to challenge constitutional wrongs where federal habeas is not available. DeWalt, 224 F.3d at 617 n. 5.

Defendant Heller recognizes that the holding of DeWalt is now the law of this Circuit. fn3 However, regardless of the Court's decision on this issue, the Court can affirm the judgment of the district court on other grounds, as discussed in the next argument.

Finally, Alejo represented by counsel, did not raise the DeWalt argument before the district court. DeWalt was decided on August 11, 2000, almost a month before the magistrate judge's report and recommendation was filed. However, in his objections filed on September 25, 2000, Alejo did not reference DeWalt, nor attempt to argue that Heck should not be applied to his case. (R. 110; Pl. App. A089-A092). When the district court cited DeWalt and its belief that the case did not affect the issues of Alejo's case, Alejo made no attempt to have the court reconsider the issue. He waited until the appeal to first present his argument on the application of DeWalt without first giving the district court an opportunity to address it.

* * *

CONCLUSION

Defendants-Appellees Gary Heller and Keith Heckler respectfully request that this Court affirm the district court's judgment.

Respectfully submitted,

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Footnotes

fn3 However, Defendant Heller notes the case of Huey v. Stine, 230 F.3d 226 (6th Cir. 2000). In Huey, decided after and citing DeWalt, the Sixth Circuit stated:

> Although Spencer may cast doubt upon the universality of the "favorable termination" requirement, we will continue to follow the Supreme Court's directly applicable precedent and "leave to the Court 'the prerogative of overruling its own decisions.'" (citations omitted).

Huey, 230 F.3d at 230.